SURUHANJAYA PELABUHAN PULAU PINANG

v.

BOSS RAMASAMY

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: P-02-377-96]
28 JULY 2000

CIVIL PROCEDURE: *Parties - Reinstatement of defendant - Application to amend writ and statement of claim to reinstate original defendant - Application made under O. 20 r. 5(3) Rules of the High Court 1980 - Whether proper - Whether an improper way to add a party whose addition had been barred by limitation*

The plaintiff employee had earlier commenced an action to be reinstated to his former position. In the course of the action, the plaintiff made an application under O. 20 r. 5(3) Rules of the High Court 1980 ('RHC') to amend the amended writ and statement of claim to reinstate the appellant as the first defendant (after the appellant had been released as a party on a previous application by the plaintiff for substitution of defendant) and to refer the existing first defendant as the third defendant. By the time that application was made, limitation had set in such that the appellant could no longer be added as a party. The learned judge allowed the plaintiff's application and the appellant appealed.

Held:
Per Mokhtar Sidin JCA

[1] An amendment under O. 20 r. 5(3) RHC is only allowed to correct a misnomer or, alternatively, a genuine mistake which is not misleading as to the identity of the party intended to be sued.

[2] It was not disputed that when the plaintiff first commenced the action he had named the appellant as the first defendant and the Government of Malaysia as the second defendant. At that particular time, the appellant entered appearance unconditionally and filed its statement of defence. There was no application to set aside the writ and statement of claim indicating that the appellant admitted that the plaintiff had sued the correct parties. From the very beginning, the appellant did not object to being made a party.

[3] The plaintiff's application, if allowed, would become a novel way to circumvent the limitation period which had expired for the plaintiff to add the appellant as a party.

[4] The plaintiff should have applied to add Penang Port Sdn Bhd as a party to the suit from the beginning. Instead he applied to substitute Penang Port Sdn Bhd as the first defendant in the place of the appellant. He did this at his own peril. There was no mistake of identity here because the plaintiff knew that the appellant and Penang Port Sdn Bhd co-existed as two separate and different entities. As at 26 September 1995, the appellant to all intents and purposes had ceased to be a party to the action.

[5] Further, the plaintiff's application was made under O. 20 r. 5 RHC which is for correction of name of a party and not for reinstatement of a party.

[Defendant's appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Tindakan ini adalah berkenaan dengan permohonan plaintif untuk pengembalian semula jawatannya. Plaintif telah membuat satu permohonan dibawah A. 20 k. 5(3) RHC untuk meminda writ dan pernyataan tuntutan bagi menamakan perayu sebagai defendan pertama (selepas perayu dibebaskan dari menjadi pihak dalam tindakan ini melalui permohonan yang terdahulunya dibuat oleh plaintif untuk penggantian defendan) dan untuk merujuk kepada defendan pertama yang sedia ada sekarang sebagai defendan ketiga. Apabila permohonan ini dibuat, batasan masa telah bermula, maka perayu tidak lagi dapat dijadikan sebagai satu pihak dalam tindakan ini.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Sesuatu pindaan di bawah A. 20 k. 5(3) RHC hanya akan dibenarkan untuk membetulkan satu penggunaan nama yang salah atau secara alternatif jika terdapat kesilapan yang tulen yang tidak mengelirukan identiti pihak yang hendak di saman.

[2] Adalah tidak dipertikaikan bahawa apabila plaintif mula-mula memulakan tindakan ini beliau telah menamakan perayu sebagai defendan pertama dan Kerajaan Malaysia sebagai defendan kedua. Pada masa tersebut, perayu memasukkan kehadiran tidak bersyarat dan memfailkan

pernyataan pembelaan. Tidak terdapat sebarang permohonan untuk membatalkan writ dan pernyataan tuntutan menunjukkan bahawa perayu mengakui bahawa plaintif telah menyaman pihak yang betul. Sejak dari awal lagi, perayu tidak membantah dijadikan satu pihak dalam tindakan ini.

[3] Kesan permohonan ini, jika ianya dibenarkan, akan menjadi sesuatu cara yang baru bagi mengelak dari batasan had masa yang telah lupus bagi plaintif menambahkan perayu sebagai satu pihak.

[4] Mahkamah ini berpendapat bahawa plaintif sepatutnya memohon untuk menambah Penang Port Sdn Bhd sebagai satu pihak dalam tindakan ini dari awal lagi. Sebaliknya, beliau memohon untuk menggantikan Penang Port Sdn Bhd sebagai defendan pertama perayu. Perbuatan beliau ini memudaratkan diri sendiri. Tidak terdapat sebarang kesilapan identiti disini kerana plaintif mengetahui bahawa perayu dan Penang Port Sdn Bhd kedua-duanya ujud sebagai dua entiti yang berasing dan berbeza. Setakat 26 September 1995, perayu untuk segala niat dan tujuan telah berhenti dari menjadi satu pihak dalam tindakan ini.

[5] Selanjutnya, permohonan semasa dibuat dibawah A. 20 k. 5 RHC yang hanya terpakai untuk membetulkan nama satu pihak dan bukannya untuk mengembalikan satu pihak.

Case(s) referred to:

Colgate-Palmolive (Asia) Ltd v. Swedish East Asia Co Ltd [1967] 1 MLJ 115 ***(refd)***
Davies v. Elsby Brothers, Ltd [1960] 3 All ER 672 ***(refd)***
Evans Constructions Co Ltd v. Charrington & Co Ltd [1983] 1 QB 810 ***(refd)***
Government of Malaysia v. Mohamed Amin Hassan [1986] 1 MLJ 224 ***(refd)***
Refco Inc v. Troika Bullion Ltd & Ors [1989] 2 HKC 548 ***(refd)***
William Wong v. Tan Yong Chim [1968] 2 MLJ 111 ***(refd)***
Yew Bon Tew & Anor v. Kenderaan Bas Mara [1983] 1 MLJ 1 ***(refd)***

Legislation referred to:

Public Authorities Protection Act 1984, s. 2(a)
Rules of the High Court 1980, O. 15 rr. 6, 7, 8, O. 20 r. 5(2), (3)

Landlord and Tenant Act 1954 [UK], ss. 25, 29(3)
Rules of the Supreme Court [UK], O. 20 r. 5

For the appellant - Abu Haniffa Md Abdullah; M/s Sykt Abu Haniffa
For the respondent - Roy Prabhakaran; M/s Praba & Assoc

[Appeal from High Court, Pulau Pinang; Civil Suit No: 21-30-86]

Reported by Yow Ting Fong

JUDGMENT

Mokhtar Sidin JCA:

The respondent was the plaintiff in the court below (hereinafter referred to as "the plaintiff"). He was appointed on 29 December 1971 as Pegawai Keselamatan by the Suruhanjaya Pelabuhan Pulau Pinang (hereinafter referred to as "the appellant"). By a letter dated 15 May 1980, the Inspector-General of Police informed the plaintiff that his powers as an auxilliary police had been withdrawn. On 26 September 1980 the personnel manager of the appellant wrote to the plaintiff stating that:

(i) due to the fact that his powers as an auxilliary police had been withdrawn the Board decided to terminate his service as a security officer and remove him from the Security Department permanently;

(ii) the Board decided to place him on the Management Service Department as a works study officer for a period of six months with effect from 1 September 1980 to find out whether he could carry out his duties as such officer; and

(iii) his position as a works study officer would be reviewed within six months from the date of appointment.

After the six months period, *ie*, on 30 April 1981 the plaintiff received a letter from the personnel manager of the appellant informing him that his placement as a works study officer was extended for a further period of twelve months with effect from 1 March 1981 subject to review at the end of the period. By a letter dated 16 November 1982, the plaintiff was asked to attend a medical board at the Penang General Hospital on 3 December 1982. By a letter dated 30 March 1983 the plaintiff was informed that he had been retired on medical ground. The plaintiff then took up the present action seeking a declaration that his retirement was unlawful and that he be reinstated to his former position. At this stage we are not concerned with the merits of the plaintiff's action.

When the plaintiff took up this action he named the appellant as the first defendant and the Government of Malaysia as the second defendant. The writ and the statement of claim were dated 31 March 1986. On 13 April 1987 the appellant filed their statement of defence. Subsequent to that the plaintiff applied to substitute the appellant with Penang Port Sdn. Bhd. as the first defendant. By consent this application was allowed on 26 September 1995. As a result of that Penang Port Sdn. Bhd. became the first defendant in place of the appellant who then ceased to be a party to the action. From the record it was not known why this application was

made. The reason for doing so surfaced when the plaintiff made a second application to substitute the appellant as the first defendant in place of Penang Port Sdn. Bhd. and to name Penang Port Sdn. Bhd. as the third defendant.

The second application to substitute was made by way of summons-in-chambers dated 13 February 1995 (apparently the date should read 13 February 1996 because it was entered in the court's record as 245/96). On 21 May 1996 the learned judge allowed the plaintiff's claim. From the record, it appears that the caption of the parties (p. 39 of the record of appeal) is misleading. As can be seen the caption of the parties after the first amendment dated 26 September 1995 (p. 67 of the record) the words "(formerly known as Suruhanjaya Pelabuhan Pulau Pinang)" after the words "PENANG PORT SDN. BHD." had been deleted. However, in the summons-in-chambers dated 13 February 1995(?) was filed these same words reappeared again. We are not sure whether this was done intentionally or otherwise. If it was done intentionally we are of the view that this was done to mislead the court and certainly we are not happy that this was done. From the record at p. 67 it is clear that as from 26 September 1995 the first defendant was PENANG PORT SDN. BHD. since the rest of the words had been deleted.

In the summons-in-chambers dated 13 February 1995(?) the plaintiff made an application to amend the amended writ and statement of claim dated 26 September 1995 by reinstating the appellant as the first defendant and referring the existing first defendant (Penang Port Sdn. Bhd.) as the third defendant. An application for reinstatement in our view can only be done when a party has been wrongly ordered to be struck off. That is not the case here. The appellant was released from being a party in the present action on the application of the plaintiff himself. The appellant consented to that application. Why such an application was made is not known to us. As such the application to reinstate is, in our view, not proper. It is to be observed that the proper procedure to follow is to apply to have the appellant added as the third defendant. In our view, the plaintiff did not take this course of action because he knew that when the application was made the limitation period had set in. In order to circumvent that, the plaintiff made the application to reinstate. It is clear from the affidavit of the appellant that they had pleaded limitation as a defence.

The learned judge who heard the summons-in-chambers allowed the plaintiff's application on 21 May 1996. Against that decision the appellant have now appealed to us. We have allowed the appeal and we now give our reasons for doing so.

Though it was not stated in the summons-in-chambers nor in the affidavit in support under what rule this application was made, the plaintiff was in fact relying on O. 20 r. 5(3) of the Rules of the High Court. This was confirmed by the submission of the plaintiff's counsel in the court below and before us. The relevant provisions in respect of this are O. 20 r. 5(2) and (3) which state as follows:

> Order 20 r. 5 Amendment of writ or pleading with leave
>
> (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
>
> (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

Learned counsel for the appellant contended that any application to amend under that rule is subject to O. 15 rr. 6, 7 and 8. Any application to change the identity, add or substitute a party should be done under O. 15 and not under O. 20 r. 5(3). As such an application to amend under O. 20 r. 5(3) is only to correct the name of the party. It was submitted by the learned counsel for the appellant that the learned judge failed to take note of this constraint when he allowed the application by the plaintiff. From the authorities we agree with the learned counsel that the amendment under O. 20 r. 5(3) is only confined to correcting the name of a party, for example, a misnomer. In any event, there is an exception to this rule in that an amendment may amount to substituting a new party if it can be shown that there was a mistake in naming the party intended to be sued or be sued and that mistake is not misleading or such as to cause any reasonable doubt as to the identity of the party.

In *William Wong v. Tan Yong Chim* [1968] 2 MLJ 111, the plaintiff's solicitors inquired as to the owners of a vessel called "Winsen Steamship Company S.A.". The defendant's solicitors confirmed that the owner of the vessel was a limited company based in Hong Kong. The original writ named the limited company. When the writ was to be served, the plaintiff's agent, a firm of solicitors in Hong Kong, wrote to say that the company was not in existence but a firm in the same name did exist. The plaintiff

amended the writ and the claim by substituting the limited company with two individual defendants "trading" as Winsen Steamship Company S.A. William Wong, one of the defendants and a partner in the firm, applied to strike out the writ and the claim stating that the firm was not the owners of the vessel. Thereafter the plaintiff applied to reamend the writ and the claim in the form it originally was by showing the limited company as the defendant. To confuse the matter further, William Wong was also a director of the limited company. Both the firm and the limited company carried the same name and their place of business was the same. The defendant, William Wong, being a director of the limited company applied to strike out the application to reamend. The Singapore Federal Court held that as the firm and the limited company existed as separate entities and the writ had been addressed to the firm, a reasonable man receiving the writ would have been justified in thinking that despite the fact that the owners of the vessel in question were a limited company and despite the fact that this information had been given to the plaintiff, the firm was clearly the intended defendant. The amendment, therefore, involved the addition of a new defendant and was not merely the correction of a misnomer.

In *Colgate-Palmolive (Asia) Ltd. v. Swedish East Asia Co. Ltd.* [1967] 1 MLJ 115, the applicants issued a writ against the Malaya Indonesia Line claiming damages in respect of the delivery of goods. The writ was issued within the limitation period of one year after delivery but it appeared that the writ was wrongly brought against the Malaya Indonesia Line, as they were not an entity known to the law. The correct defendants should have been the Swedish East Asia Co. Ltd. and on 3 April 1964, an order was made giving the plaintiffs liberty to amend the writ and statement of claim accordingly. The defendants pleaded limitation. The High Court dismissed the application. On appeal to the Federal Court, Winslow J at p. 117 said:

> It is clear that, in deciding whether a case of misnomer has occurred in the name on the writ, the test to be applied is how would a reasonable person receiving the document take it. In the present case Messrs. Mansfield & Co. Ltd. who were the recipients of the writ, were agents of both Malaya Indonesia Line and Swedish East Asia Co. Ltd. It should also be noted that Malaya Indonesia Line is a name under which three incorporated shipping companies, including Swedish East Asia Co. Ltd., carry on business. Applying the test of the reasonable person, what this court has to decide is whether Messrs. Mansfield & Co. Ltd., as reasonable persons, could have been in no doubt when they received the writ that it was Swedish East Asia Co. Ltd. whom the plaintiffs intended to sue. In my opinion the answer must be in the negative.

Further down at p. 118 he said:

> Complaint was made before this court that there was no appeal against this order substituting "Swedish East Asia Co. Ltd." as defendants in place of "Malaya Indonesia Line". Malaya Indonesia Line, of course, need not have concerned themselves with any appeal since they had been removed as defendants. If the complaint was directed against Swedish East Asia Co. Ltd., the new defendants, the answer is that there was clearly no necessity, on the facts, for them to appeal. Their remedy, namely the right to plead with success the defence of limitation, was still open to them.
>
> It is clear from Order XVI rule 11(4) that proceedings as against Swedish East Asia Co. Ltd. shall be deemed to have begun only on the service of the writ on them. Service of the writ on them was dispensed with. Proceedings against them can, therefore, be deemed to have been instituted, at the very earliest, only when they were made a party *ie*, on 3rd April, 1964 by which time the period of limitation had already expired.
>
> Some reliance seems to have been placed on Order XVI rule 13 for the proposition that the added or substituted defendant should be in exactly the same position as the original defendant for all purposes and that time should begin to run against the plaintiff only up to the date of the original writ as against such a defendant. I do not think that Order XVI rule 13 contemplates any inroads on the law relating to limitation so as to enable a substituted defendant to be made liable as though he had been sued in the first instance within the statutory period. One has only to consider the concluding words of Order XVI rule 11 to realise that this must be so because proceedings against an added party under this rule "shall be deemed to have begun only on the service on it of such writ." In other words, when a defendant is added or substituted the proceedings cannot be ante-dated as against him. He has a vested right not to be succesfully sued outside the limitation period.

In *Davies v. Elsby Brothers, Ltd.* [1960] 3 All ER 672, the plaintiff until 1955 had been employed by a firm called Elsby Brothers. In 1955 the business of this firm was taken over by a company called Elsby Brothers, Ltd., which continued the plaintiff's employment. On 20 March 1956, the plaintiff was injured in an accident which he alleged was due to the negligence of his employers, and on 18 March 1959, the plaintiff's solicitors issued a writ for him against "Elsby Brothers (a firm)" claiming "damages for injuries and loss sustained by the plaintiff while an employee of the defendants by the negligence of the defendants and/or their servants". The date when the injuries were sustained was not stated on the writ. On 17 March 1960 (*ie*, after the priod of limitation had expired) the plaintiff's solicitors applied for and were granted leave to amend the writ by changing the name of the defendants from "Elsby Brothers (a firm)" to "Elsby Brothers, Ltd.". The amended writ was served on 19 March 1960. Held:

the amendment involved the addition of a new defendant, the limited company, and was not merely the correction of a misnomer, for there had been two different entities, the firm and the company, the writ correctly described the firm and, the date of the accident not being given, did not show that the company must have been intended (see p. 675, letters B to E, and p. 670, letter G, post); therefore, the amendment should not have been granted, since, analogously to the position where leave to add a plaintiff was sought, leave to add a defendant should not be granted after the expiry of the period of limitation.

At p. 675, Pearce LJ said:

> The case before us is not easy, but I am persuaded that counsel for the defendants is right in arguing that the entity of the limited company is not contained on the writ, and that to add the word "Ltd." would be to add a new party to this action. It is not correct to say that the company has taken the place of the firm. The firm no doubt assigned its business to the company; but it co-existed with the company, as the two companies in Re Nos. 55 & 57, Holmes Road, Kentish Town (11) co-existed. After the company had taken over its business the firm could have been sued in respect of an accident that happened while the firm was still carrying on the business. If one of the deciding factors be whether the defendants, on looking at the writ, must have known that the writ, though the name was inaccurate, was addressed to them, then in my view it was not possible for them to say that the writ must have been intended for the company. The date of the accident is not specified in the writ. It was possible that the accident referred to in the writ was one which had occurred while the firm was still carrying on the business. Therefore, there being the two definite, separate entities, the firm and the company, it is not possible to say that the inclusion of the firm on the writ was a mere misnomer for the inclusion of the limited company.

In *Evans Constructions Co. Ltd. v. Charrington & Co. Ltd.* [1983] 1 QB 810, under the terms of a seven-year lease dated 27 August 1970 made between E. Ltd. and E. Ltd., became tenant of land at Ashford, Surrey, for use in connection of its business and to which the Landlord and Tenant Act 1954 applied. During the currency of the lease, or shortly thereafter, C. Ltd. assigned the reversion to B. Ltd., a company that was a member of the same group of companies. After the assignment C. Ltd. acted as managing agent for B. Ltd. In April 1977 E. Ltd. entered into a new three-year lease with B. Ltd. that was stated to be supplemental to the original lease. In September 1981, C. Ltd. wrote to E. Ltd. enclosing a notice under s. 25 of the Landlord and Tenant Act 1954 terminating the tenancy. The notice stated that it was given by C. Ltd. as agent for B. Ltd.

On receipt of the notice E. Ltd. wrote to C. Ltd. stating that it was not prepared to give up possession of the land and would apply to the county court under s. 29(3) of the Act of 1954 for a new tenancy. E. Ltd.'s solicitors, within the permitted two-month time limit, entered an originating application in the Staines County Court in which he erroneously named C. Ltd. as landlord. In March 1982 a county court registrar ordered that the application be struck out on the grounds that C. Ltd. was not the landlord. E. Ltd. appealed against that order. The judge allowed the appeal and gave leave to join B. Ltd. as an additional respondent under the provisions for amending pleadings contained in RSC O. 20 r. 5. The Court of Appeal reversed the decision of the judge.

In his judgment Waller LJ at p. 816 said:

> By virtue of the provisions of Ord. 40, r. 8 and Ord. 8, r. 35 of the County Court Rules an originating application must be served within two months of issue. This application was issued on January 19, 1982, and therefore had to be served before March 19, 1982. It was in fact served on Charringtons within that time, namely February 2. The application to amend was not made until April 2, or alternatively April 24, and is therefore out of time. Nevertheless Ord. 20, r. 5(2) would allow such an amendment if it is just to do so. An application to correct the name of a party must be made under Ord. 20, r. 5(3). Evans seeks to substitute Bass for Charringtons, and it submitted that this is the correction of a name. We have been referred to a number of cases where corrections have been made under this rule but in every case it is plainly a variation of the name, for example "R.S. Parker" for "R.J. Parker" (see *Rodriguez v. R.J. Parker (Male)* [1967] 1 QB 116) and "Harris Ltd." for "Harris (Leeds) Ltd.": see *Mitchell v. Harris Engineering Co. Ltd.* [1967] 2 QB 703. We were informed that no case could be found without this feature.
>
> In the present case there was no mistake as to name. Mr. Greenwood, Evans' solicitor, in his affidavit frankly stated he thought Charringtons was the landlord. The mistake here was not a mistake as to name; it was a mistake as to identity.

Donaldson LJ in his judgment at pp. 821-822 said:

> In applying Ord. 20, r. 5(3) it is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B. The rule is designed to correct the latter and not the former category of mistake. Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding

> circumstances. In the instant case I have not the slightest difficulty in accepting Mr. Greenwood's assertion that he intended to sue the relevant landlord under the Act. After all, he was responding on behalf of his lessee client to a notice to quit given on behalf of the landlord and it would have been surprising, to say the least, if he had thought that it was appropriate to respond by claiming a new lease from the managing agent or any other stranger to the landlord and tenant relationship. Accordingly I would conclude that he made a genuine mistake of a character to which Ord. 20, r. 5(3) can apply.
>
> However, the matter does not stop there, because it is not every mistake of this character which can be corrected under the rules. The applicant for leave to amend has to satisfy the court that the mistake was not misleading or such as to cause any reasonable doubt as to the identity of the person intended to be sued.

Griffiths LJ at p. 825 said:

> It is not how possible to correct the mistake by adding Bass as a party to the proceedings under Ord. 15, r. 1 as the time for making the application for a new tenancy under section 29(3) of the Landlord and Tenant Act 1954 has long since expired. Ord. 20, r. 5(2) however specifically empowers the court to allow an amendment to correct the name of a party even though the relevant limitation period has expired, provided that it is just to do so. I have no doubt that it would be just to do so in this case, otherwise Bass will be able to take advantage of a mistake by Evans' solicitor, the nature of which Bass must have been well aware of and which cannot possibly have misled Bass.
>
> But the question remains, does this case fall within the scope of R.S.C. Ord. 20, r. 5(3)? Is the rule to be limited to mere mis-spelling or some other slip such as leaving out one word in the long title of a company so that looking at the name on the proceedings the nature of the mistake can readily be seen; or it is to be more liberally construed so that it will cover the case when entirely the wrong name has been used? I see no reason why it should not include a case where entirely the wrong name has been used, provided it was not misleading, or such as to cause any reasonable doubt as to the identity of the person intended to be sued. The identity of the person intended to be sued is of course vital. But in this case I have no doubt that the identity of the person intended to be sued was the current landlord, Bass. The wording of the rule makes it clear that it is not the identity of the person sued that is crucial, but the identity of the person intended to be sued, which is a very different matter.

Though Waller LJ dissented, what is important is that the three judges agreed on the principle that an amendment under O. 20 r. 5 is allowed only to correct a mistake as to name, but not to a mistake of identity.

The majority decision went on to the extent that an amendment as to a mistake of identity is allowable if it is not misleading or such as to cause any reasonable doubt at to the identity of the person intended to be sued.

As can be seen from the above cases, it is clear that an amendment under O. 20 r. 5(3) is only allowed to correct a misnomer or, alternatively, there was a genuine mistake which was not misleading as to the identity of the party intended to be sued. From the evidence in the present appeal it is not disputed that when the plaintiff commenced the action he had named the appellant as the first defendant and the Government of Malaysia as the second defendant. The appellant entered appearance unconditionally and filed their statement of defence dated 13 April 1987. There was no application to set aside the writ and statement of claim by the appellant indicating that the appellant admitted that the plaintiff had sued the correct parties. Sometime in 1995 (about eight years later) the plaintiff applied to amend the writ and the claim by substituting Penang Port Sdn. Bhd. for the appellant. It is rather unfortunate that the application is not in the record of appeal and we would not know the reasons why this was done. Obviously it was not prompted by the appellant. The appellant from the very beginning did not object to being made a party.

Sometime in 1996, by the present summons-in-chambers, the plaintiff applied to bring back the appellant as a defendant by way of reinstatement instead of adding as a defendant. The effect of this application is to substitute the appellant as the first defendant in place of the Penang Port Sdn. Bhd. (the existing first defendant) and to rename the existing first defendant as the third defendant. As we have said earlier this was a novel way to circumvent the limitation period which had expired.

In the affidavit supporting the application, the plaintiff gave the reason why the first application to amend was made. According to that affidavit, the plaintiff made inquiries and pursued the avenue of a settlement. As a result of those inquiries he received the following "without prejudice letter" from Penang Port Sdn. Bhd.:

> Dear Sirs,
>
> **PENANG HIGH COURT**
> **CIVIL SUIT NO. 21-30-86**
>
> We refer to your letter Ref. D656/1 dated 15 April 1995.

Penang Port Sdn. Bhd. hereby confirms that in this case liability is with us.

As to your request for an out of court settlement, we will revert back to you on a later date.

Thank you.

Yours faithfully,

Sgd.

(Ramlee bin Mohd. Din)
For General Manager (Legal/Administration)
Penang Port Sdn. Bhd.

Perusing the letter, there is nothing to show that the Penang Port Sdn. Bhd. had taken over the functions and duties of the appellant or that they had replaced the latter. There is nothing to show that the appellant had ceased to exist. The only thing that the letter stated was that the Penang Port Sdn. Bhd. accepted liability in the present suit. In our view at most, the plaintiff should apply to add Penang Port Sdn. Bhd. to be a party to the suit. Instead he applied to substitute Penang Port Sdn. Bhd. as the first defendant in the place of the appellant. He did this at his own peril. In our view there is no mistake of identity because the plaintiff knew that the appellant and Penang Port Sdn. Bhd. co-exist as two separate and different entities. There is no question of mistake as to the identity of the parties here.

The application by the plaintiff in the present appeal is to reinstate the appellant as the first defendant. We are of the view that the application is misconceived, because there is nothing to reinstate. As at 26 September 1995, the appellant for all intents and purposes had ceased to be a party to the action. Further, the present application is made under O. 20 r. 5 which is to correct the name of a party and not for the reinstatement of a party. We have gone through the Rules of the High Court and we are not able to find a provision to reinstate a party. There are of course provisions to substitute a party, joinder of parties and to add a party as found in O. 15 and 20. It appears that the present application is more to substitute and/or to add a party.

The present application which is made under O. 20 r. 5(3) is to correct a misnomer or a mistake as to the identity of the party. We find that such a situation does not arise in this appeal.

We are of the view that the learned judge had erred when he allowed the application and concluded that "... the justice of the case is with the plaintiff; it would be just and fair to allow the amendment as prayed". As can be seen from the authorities we have cited the criteria is whether it is a correction of a misnomer or whether to correct a genuine mistake. As can be seen in *William Wong v. Tan Yong Chim* and *Davies v. Elsby Brothers, Ltd.*, even to amend to change the name from a firm to a Ltd. Co. was not allowed on the ground that they were two separate entities. It is the same in *Colgate-Palmolive (Asia) Ltd. v. Swedish East Asia Co. Ltd.* and *Evans Constructions Co. Ltd. v. Charrington & Co. Ltd.*. In the present application the plaintiff invited himself to be in the present situation without any prompting or any misrepresentation from the appellant or the other defendants. He had himself to be blamed for it.

In *Refco Inc v. Troika Bullion Ltd & Ors* [1989] 2 HKC 548, it was held that where a plaintiff had made a mistake about the defendant when instituting his action, and any relevant period of limitation had expired before he discovered the mistake, it was essential to carefully analyse the nature of the plaintiff's mistake. If it was a mistake as to the defendant's identity, the plaintiff would have lost his chance to sue the person who in fact was the author of the plaintiff's wrong. If it was merely a mistake as to correct a name or description of the defendant, the matter is curable. The plaintiff in that case had not simply misnamed or misdescribed the correct defendant but had identified the wrong defendant. It was obvious that the case did not fall within the provision of O. 20 r. 5(3) which permitted an amendment only to correct a genuine mistake as to the name of a defendant, which could be done even after the expiry of a relevant period of limitation. But at the same time, it required the court to be satisfied that the mistake was not misleading and not such as to create any reasonable doubt as to the identity of the person intended to be sued.

In our view the present application is not to correct a misnomer or a mistake as to identity because the first defendant (Penang Port Sdn. Bhd.) had been retained and proposed to be the third defendant. In other words, the plaintiff wanted to add the appellant as a party. This is explained in *Government of Malaysia v. Mohamed Amin bin Hassan* [1986] 1 MLJ 224 where Lee Hun Hoe CJ (Borneo) (as he then was) at pp. 227 and 228 said:

> What the respondent did was not correcting the name of a party. Neither was it a matter of mistake. It was merely the addition of a new and different party. This is not permissible under any provision of the Order 15 rule 1, particularly when the period of limitation affecting the proposed plaintiff had

> expired. This is not a case of altering a party suing in his representative capacity into his personal capacity. It is a case of adding a new party to the original suit. For that very reason the learned magistrate rightly refused to grant leave to Hanah binte Ahmad to be made the 2nd plaintiff. What special reason is there to differentiate the case of the respondent. It is merely a coincidence that he sued in a representative capacity. Clearly the court has no power to reinstate an action which must fail in limine upon a plea of limitation. ...

In the affidavit dated 24 April 1996 affirmed by Norlaila bt. Ibrahim filed on behalf of the appellant, objecting to the present application, the appellant at para. 7 did raise the issue of limitation. It was stated as follows:

> 7. I deny paragraph 8 of the Plaintiff's Affidavit. The Penang Port Commission was removed as a party on 26/9/95 and an action to bring back the Penang Port Commission would be gravely prejudicial to us and barred by limitation.

As can be seen the cause of action commenced on 30 March 1983 when the plaintiff received the letter from the appellant informing him that he had been retired. The present application was made on 13 February 1996 some thirteen years later and by then limitation had set in. As such the defence of limitation is clearly available to the appellant and they could not be deprived of it. It is a right which is not to be taken away as stated by the Privy Council in *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 MLJ 1. In that case the appellants brought an action in March 1975 for damages for personal injuries sustained by both of them in a motor accident that took place in April 1972 between a motorbus belonging to the respondents and a motorcycle ridden by the first appellant with the second appellant as a pillion passenger. Section 2(a) of the Public Authorities Protection Act 1948, which applied provided that an action shall not lie or be instituted unless it is commenced within twelve months after the act complained of. With effect from June 1974, this provision was amended to substitute "thirty-six months" for the "twelve months". On 20 March 1975 the appellants issued a writ claiming damages for personal injuries. The respondents filed a defence in which they pleaded that the appellants were barred from bringing the action by virtue of the Public Authorities Protection Act 1948. The learned trial judge decided in favour of the appellants but on appeal the Federal Court held that the time for the claim was not enlarged by the amending act, which had no application to a cause of action which was barred before the amending act came into operation. The appellants appealed. In dismissing the appeal, the Privy Council held that an accrued right to plead a time bar which was acquired after the lapse of a statutory period, was every sense a right, even though

it arises under an act which was procedural. It was a right which was not to be taken away by conferring on the statute a retrospective operation, unless such a construction was unavailable. In that case the respondents acquired a right when the period prescribed by the 1948 Ordinance expired, and this was not taken away by the 1974 amending Act.

In the present instant, the plaintiff had three years from 1 April 1983 to file the writ and the claim against the appellant. When the present application was made it was beyond that three years.

For the above reasons, we find that there is no merit in the plaintiff's application. The application should be dismissed with costs. We therefore allowed the appeal with costs here and below. The order of the learned trial judge is set aside with the deposit to be refunded to the appellant.